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NO. 87-5222

Supreme Court, U.S.
FILED
AUG 27 1987
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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1986

JAMES CAROL WILLIAMS,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

MARY F. KELLER
Executive Assistant
Attorney General for Litigation

ROBERT S. WALT*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

* Counsel of Record

QUESTION PRESENTED

WHETHER THE JURY'S CONSIDERATION OF UNADJUDICATED CRIMINAL CONDUCT WITHOUT CAUTIONARY INSTRUCTIONS DURING THE PUNISHMENT PHASE OF A CAPITAL TRIAL RESULTING IN IMPOSITION OF THE DEATH PENALTY VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent[1] herein, by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 814 F.2d 205 and is attached hereto as an appendix.

[1]For clarity, the Respondent is referred to as "the state," and Petitioner as "Williams."

JURISDICTION

Williams seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Williams bases his claims upon the eighth and fourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE

The state has lawful and valid custody of Williams pursuant to a judgment and sentence of the 179th Judicial District Court of Harris County, Texas. Williams was indicted on August 25, 1977, for the offense of capital murder of Mohamad Youssef Awada while in the course of committing and attempting to commit the offense of aggravated robbery. Upon his plea of not guilty, Williams was convicted by a jury on February 21, 1978, of the charged offense. After a separate hearing on punishment, the jury affirmatively answered the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987) on February 22, 1978. Accordingly, a death sentence was assessed. Williams' conviction was automatically appealed to the Texas Court of Criminal Appeals, which affirmed the conviction and sentence on June 11, 1980. Williams v. State, 604 S.W.2d 146 (Tex.Crim.App. 1980). A petition for writ of certiorari was not sought in this Court.

Williams' execution was thereafter scheduled for January 28, 1981. On January 22, 1981, Williams fled an application for state writ of habeas corpus in the trial court. On that date, the trial court withdrew the warrant of execution. Williams filed an application for stay of execution in the Texas Court of Criminal Appeals on January 26, 1981. The Court of Criminal Appeals denied the writ application and the application for stay without written order on the same day. Ex parte Williams, No. 9947 (Tex.Crim.App. Jan. 26, 1981).

On January 23, 1981, Williams filed his petition for writ of habeas corpus and his application for stay of execution in the

United States District Court for the Southern District of Texas, Houston Division. On January 26, 1981, the district court granted a stay of execution. On January 8, 1986, an evidentiary hearing was held before the Honorable Karen K. Brown, United States Magistrate. On March 31, 1986, Magistrate Brown issued her Memorandum and Recommendation, in which, after addressing each of Williams' claims, she recommended that the petition be dismissed. There being no objection to the magistrate's report, the district court thereafter entered an order of dismissal and final judgment. Williams v. McCotter, No. H-81-180 (S.D.Tex.--Houston May 27, 1986).

On August 1, 1986, the district court issued a certificate of probable cause to appeal. On April 10, 1987, the United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment and vacated the stay of execution issued by the district court. Williams v. Lynaugh, 814 F.2d 205 (5th Cir. 1987). Thereafter, the state convicting court re-scheduled Williams' execution for a time before sunrise on September 15, 1987.

STATEMENT OF FACTS

The facts surrounding Williams' commission of the murder of Mohamad Awada are not relevant to the issue before the Court. The record reflects that on July 6, 1977, Williams was observed by three individuals, including Williams' nephew, robbing Awada at gunpoint in Awada's place of employment, a Sigmor-Diamond Shamrock filling station. As Williams was exiting through a door after robbing Awada, he turned and fired four shots, three of which struck Awada. Awada was taken to a hospital, where he died as a result of his wounds on July 11, 1977.

During the punishment phase of Williams' trial, evidence was received regarding Williams' participation in an armed robbery in a restaurant less than two weeks prior to the murder of Mohamad Awada. Two employees of the restaurant positively identified Williams as being one of the robbers.

SUMMARY OF ARGUMENT

There is no special and important reason for reviewing this case. Hence, this Court should, in its discretion, deny the petition for writ of certiorari.

The admission of evidence during the punishment phase of trial of Williams' commission of an armed robbery did not violate the eighth amendment. By requiring the finding of at least one aggravating factor at the guilt phase of trial and allowing the admission of all evidence in mitigation of punishment during the punishment phase of trial, the Texas capital sentencing procedures comply with the eighth amendment's requirements. Moreover, the Texas rule allowing the admission of unadjudicated offenses during the punishment phase effectuates this Court's requirement that all possible relevant evidence regarding a defendant's character be before the jury during its sentencing deliberations.

The admission of unadjudicated criminal conduct did not deprive Williams of his right to due process of law. Such evidence was limited to the punishment phase of trial, thus eliminating the risk that it might influence the jury's decision on guilt. The evidence was clearly relevant and probative on the issue whether Williams would commit further acts of violence. Finally, the jury was required to find the existence of the special issues on punishment beyond a reasonable doubt.

The legislative decision to allow admission of extraneous unadjudicated offenses during the punishment phase of capital trials but not in non-capital trials does not violate the Equal Protection Clause of fourteenth amendment. Given this Court's mandate that all relevant information regarding a capital defendant be before a jury in its sentencing deliberations, a state could rationally conclude that allowing the admission of evidence of unadjudicated criminal conduct furthers that objective.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Williams has advanced no special or important reason in this case, and none exists.

II.

THE ADMISSION DURING THE PUNISHMENT PHASE OF EVIDENCE OF WILLIAMS' PARTICIPATION IN AN UNADJUDICATED ARMED ROBBERY IS CONSTITUTIONALLY PERMISSIBLE.

A. The admission of such evidence does not undermine the constitutional validity of the Texas capital sentencing scheme and, thus, is not violative of the Eighth Amendment.

Williams first asserts that the introduction of evidence at the punishment phase of his trial of his participation in an armed robbery of a restaurant committed less than two weeks prior to the capital murder violates the eighth amendment proscription against cruel and unusual punishment. He acknowledges, as he must, that the Texas capital sentencing procedures have been held to provide "a means to promote the evenhanded, rational and consistent imposition of death sentences under the law" and a system which "serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." Jurek v. Texas, 428 U.S. 262, 276 (1976); see also Pulley v. Harris, 465 U.S. 37, 48-49 (1984). However, Williams asserts that because there was no evidence that he was either charged with or convicted for the offense, such evidence lacks reliability and, therefore, results in an arbitrary and capricious imposition of his death sentence.

Williams' argument ignores the manner in which this Court deemed the Texas capital sentencing procedure to comply with the eighth amendment. Arbitrary and capricious imposition of death sentences in Texas is avoided by Texas' narrow definition of

capital murder to include at least one aggravating circumstance, thus effectively channeling juror discretion. Jurek v. Texas, 428 U.S. at 268; Thompson v. Lynaugh, 821 F.2d 1054, 1059 (5th Cir.), cert. denied, ___ U.S. ___, 107 S.Ct. ___ (July 7, 1987). Further, "wanton or freakish" imposition of the death penalty is avoided because a defendant is allowed to present whatever evidence in mitigation he can muster during the punishment phase of a capital trial. Jurek v. Texas, 428 U.S. at 276. Moreover, above what is constitutionally required, a Texas jury's discretion is further narrowed by the fact that it must find the existence of two, and in certain instances, three special issues in the punishment phase of a capital murder trial, and the state must prove the existence of these issues beyond a reasonable doubt. Tex. Code Crim. Proc. Ann. art. 37.071(b)(c) (Vernon Supp. 1987); see also Thompson v. Lynaugh, 821 F.2d at 1059-60.

Williams does not, and cannot, contend that his involvement in an armed robbery close in time to the murder of Mohamad Awada was not relevant to the issue of whether there was a probability he would commit further acts of violence that would constitute a continuing danger to society. Rather, he asks this Court to formulate a rule which would exclude such relevant evidence from the jury's consideration. Such a rule would circumvent this Court's holding in Jurek that it is essential that a capital sentencing jury have before it all possible relevant information about the defendant whose fate it must determine. 428 U.S. at 276. The Texas rule allowing unadjudicated criminal acts into evidence fully complies with Jurek's requirement.[2]

---

[2]Williams asserts that the trial court should have instructed the jury to provide specific and detailed guidance in its consideration of such evidence. See Petition at 6. However, no instructions were requested at trial. Moreover, specific instruction to guide the jury's consideration of aggravating and mitigating evidence is not constitutionally mandated. Zant v. Stephens, 462 U.S. 862 (1983).

Moreover, Williams' claim that the Texas rule of evidence results in the arbitrary and capricious imposition of a death sentence ignores three fundamental facts. First, because the evidence is admitted only in the punishment phase of trial, the Texas rule of evidence does not create a risk of influencing a jury's determination of guilt. Second, the question of Williams' "future dangerousness," on which the extraneous offense was relevant, was required to be established beyond a reasonable doubt. Finally, the increase in likelihood of the imposition of a death sentence does not outweigh the probative value of the evidence. In rejecting a constitutional attack to the use of psychiatric testimony on the basis that such evidence was unreliable, this Court stated:

> There is no doubt that the psychiatric testimony increased the likelihood that petitioner would be sentenced to death, but this fact does not make that evidence inadmissible, any more than it would with respect to other relevant evidence against any defendant in a criminal case. At bottom, to agree with petitioner's basic position would seriously undermine and in effect overrule Jurek v. Texas. . . . We are not inclined, however, to overturn the decision in that case.

Barefoot v. Estelle, 463 U.S. 880, 905-06 (1983). Thus, it is clear that the fact that a final conviction for aggravated robbery might be given more weight by a jury than would an unadjudicated offense does not render such unadjudicated criminal conduct irrelevant. Hence, Williams' eighth amendment challenge to his conviction is meritless.

B. The admission of such evidence was probative and relevant, and thus not violative of the Due Process Clause of the Fourteenth Amendment.

In a related claim, Williams asserts that the admission of evidence of his unadjudicated criminal conduct at the punishment phase of his trial amounts to a deprivation of due process because, inasmuch as he had not previously been found guilty of the criminal offense, the jury's punishment decision was not a

"well founded and individualized decision," but rather was based on "supposition, innuendo and chance." See Petition at 8.

In addressing Williams' claim, the court below followed its established precedent in Milton v. Procunier, 744 F.2d 1091 (5th Cir. 1984), cert. denied, 471 U.S. 1030 (1985). In addressing Milton's due process claim relating to the admission during the punishment phase of prior unadjudicated robberies, the court stated:

> The focus of Article 37.071(c), Tex. Code Crim. Proc. Ann. is in part predictive. While it assigns a difficult task to juries in capital crimes, the inquiry into a defendant's probable future conduct is responsive to the constitutionally rooted concern that the death penalty not be administered in an arbitrary or capricious way. Certainly all "relevant" information ought to be before a jury facing this task. At the same time there remains a long-held reservation about the use of wrongdoing not then being tried. These concerns express our acceptance that a jury suffers the human weakness of blending wrongs -- a result inconsistent with our fundamental commitment to charge specificity, jeopardy and due process. But these concerns are addressed by properly applied standards of relevance and sufficiency of proof. Moreover, the underlying concern that a jury may allow proof that a defendant is a bad person to color its assessment of present guilt is absent when extraneous offenses are received, as here, only at the sentencing phase.

744 F.2d at 1097.

The court below also emphasized that Williams' extraneous unadjudicated offense was introduced only at the punishment phase of trial, thus eliminating any concern that such evidence influenced the jury's decision on guilt. Moreover, as the court below noted, Williams' extraneous offense was clearly relevant to the question of whether Williams would continue to commit acts of violence. Williams v. Lynaugh, 814 F.2d at 207-08. Further, Williams' assertion of lack of reliability is belied by the fact that the state bore the burden of proving Williams' "future dangerousness" beyond a reasonable doubt. Hence, because the evidence of his unadjudicated criminal conduct was limited to the punishment phase of trial, the evidence was highly relevant to

the second special issue on punishment, and because the state bore the burden of proving that issue beyond a reasonable doubt, no due process violation is shown.

C. The fact that unadjudicated criminal conduct is admissible in capital sentencing hearings but not in non-capital sentencing hearings does not constitute an equal protection violation.

Williams finally contends that because the State of Texas allows for the introduction of evidence of unadjudicated criminal conduct in capital sentencing trials, whereas it does not allow such evidence in non-capital cases, the Texas capital sentencing procedure, both on its face and as applied, violates the Equal Protection Clause of the fourteenth amendment.

Williams concedes that his equal protection claim is subject to a minimum rationality test. See Petition at 9.[3] Thus, the legislative classification must rationally promote a legitimate governmental objective, and the Equal Protection Clause is "offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." McGowan v. Maryland, 366 U.S. 420, 425 (1961). A statutory discrimination will therefore not be set aside if "any state of facts reasonably may be conceived to justify it." Id. at 426.

As this Court made unquestionably clear in Jurek, it is vital that all aspects of a defendant's character be before the jury in its punishment deliberations. As the court below correctly notes, the state has a strong interest in ensuring that all relevant evidence concerning a capital defendant is placed before the jury so that it can consider the evidence when answering the special issues. Therefore, the state could rationally conclude that different procedures should be used for

[3]The court below has consistently held that capital defendants are not a "suspect classification" for equal protection purposes. Thompson v. Lynaugh, 821 F.2d at 1062; Gray v. Lucas, 677 F.2d 1086, 1104 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983).

capital defendants than for non-capital defendants. Consequently, because there exists a rational basis for the Texas rule allowing the admission of unadjudicated offenses during the punishment phase of a capital trial, no equal protection violation is demonstrated.

CONCLUSION

For these reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant Attorney
General for Litigation

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

ROBERT S. WALT*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT-APPELLEE

*Counsel of Record

APPENDIX

arms, 465 U.S. at 358–61, 104 S.Ct. at 1103–04.

Collateral estoppel should bar the subsequent prosecution here. The precise issue that was decided in the bail revocation hearing is now being tried: whether Showery had committed the involuntary manslaughter. The government failed to prove this under a substantially lower burden of proof requirement. Thus, "when a[n] issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443, 90 S.Ct. at 1194.

Assuming that double jeopardy should not attach, no irreparable injury would occur were Showery required to raise his collateral estoppel defense in the state court in the first instance. I would therefore abstain from enjoining the state trial court. *See Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Kolski v. Watkins*, 544 F.2d 762 (5th Cir.1977). Because I believe double jeopardy should attach, however, I must dissent from the judgment of the majority.

KEY NUMBER SYSTEM

James Carol WILLIAMS,
Petitioner-Appellant,

v.

James A. LYNAUGH, Director, Texas Department of Corrections,
Respondent-Appellee.

No. 86-2488.

United States Court of Appeals,
Fifth Circuit.

April 10, 1987.

Petitioner, who was convicted of murder and sentenced to death, filed application for writ of habeas corpus and motion for stay of execution. The United States District Court for the Southern District of Texas, Gabrielle K. McDonald, J., dismissed. Petitioner appealed. The Court of Appeals, Robert Madden Hill, Circuit Judge, held that: (1) admission of unadjudicated offenses in sentencing phase of petitioner's capital trial did not violate the Eighth and Fourteenth Amendments; (2) rational basis test was appropriate level of scrutiny for determining whether the Texas capital sentencing procedure violated the equal protection clause; and (3) the Texas capital sentencing procedure did not violate the equal protection clause.

Affirmed and stay of execution vacated.

1. Constitutional Law ⇐278(4)
Criminal Law ⇐1213.7

Admission of unadjudicated offenses in sentencing phase of defendant's capital trial did not violate defendant's Eighth and Fourteenth Amendment rights; evidence of these unadjudicated crimes was clearly relevant to the jury's task of determining whether there was probability that defendant would continue to commit acts of violence that would constitute continuing threat to society. Vernon's Ann.Texas C.C.P. art. 37.071; U.S.C.A. Const.Amends. 8, 14.

2. Constitutional Law ⇐278(1)

Defendant sentenced to death for murder was not entitled to stricter interpretation of due process. U.S.C.A. Const. Amend. 14.

3. Constitutional Law ⇐250.3(1)

Rational basis test for determining whether the Texas capital sentencing procedure violated the equal protection clause; capital defendants are not suspect class for equal protection purposes. U.S.C.A. Const. Amend. 14; Vernon's Ann.Texas C.C.P. art. 37.071.

4. Constitutional Law ⇐213.1(2)

Rational basis scrutiny requires only that legislative classification rationally promote legitimate governmental objective; this standard is offended only if classification rests on grounds wholly irrelevant to achievement of state's objective.

5. Constitutional Law ⇐250.3(1)
Criminal Law ⇐1206.1(2)

Texas capital sentencing procedure, which allows introduction of unadjudicated offenses in capital sentencing trials even though Texas does not allow such evidence in noncapital cases, did not violate equal protection clause; Texas has strong interest in ensuring that all relevant evidence concerning capital defendant is placed before jury in sentencing phase, and purpose of allowing evidence of unadjudicated offenses to be considered in sentencing phase is to assist jury in determining whether defendant is likely to be continuing threat to society. Vernon's Ann.Texas C.C.P. art. 37.071; U.S.C.A. Const.Amend. 14.

Michael C. Farrow, Houston, Tex., for petitioner-appellant.

Robert S. Walt, Asst. Atty. Gen., Jim Mattox, Atty. Gen., Austin, Tex., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, GARWOOD and HILL, Circuit Judges.

ROBERT MADDEN HILL, Circuit Judge:

Petitioner James Williams appeals the district court's dismissal of his petition for a writ of habeas corpus. After considering Williams' arguments, we affirm the judgment of the district court and vacate the stay of execution entered by the district court pending this appeal.

I.

Williams was convicted of killing Mohamad Youssef Awada. Since the murder was committed while robbing Awada, Williams was charged with a capital murder under Texas law. *See* Tex. Penal Code Ann. § 19.03(a)(2).[1] After the punishment phase hearing the jury answered affirmatively the special issues submitted to them.[2] Accordingly, Williams was sentenced to

1. Under Texas law the following offenses are defined as capital murders:
(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;
(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, or arson;
(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
(4) the person commits the murder while escaping or attempting to escape from a penal institution;
(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution; or
(6) the person murders more than one person:
(A) during the same criminal transaction; or
(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.
Tex.Penal Code Ann. § 19.03 (Vernon Supp. 1987).

2. After finding a defendant guilty of capital murder, the jury is required to answer three questions in a proceeding that takes place subsequent to the return of a verdict finding a person guilty of a capital murder offense. The jury must decide:
(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes, the death sentence is imposed. If the jury finds that the answer to any question is no or that it is unable to answer any question, a sentence of life imprisonment results.
Tex.Code Crim.Proc.Ann. art. 37.071 (Vernon Supp.1987).

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EN HILL, Circuit

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death. Williams' conviction was affirmed by the Texas Court of Criminal Appeals. *Williams v. State*, 604 S.W.2d 146 (Tex.Crim.App.1980) (en banc). After exhausting his state remedies, Williams filed an application for a writ of habeas corpus and a motion for a stay of execution in federal district court. The district court granted the stay of execution on January 26, 1981. On January 8, 1986, an evidentiary hearing was held before the magistrate. The magistrate rejected each of Williams' claims and recommended that his petition for habeas corpus be dismissed. The district court adopted the opinion of the magistrate and entered an order on May 27, 1986, dismissing Williams' petition. On August 1, 1986, the district court granted Williams a certificate of probable cause as well as permission to proceed in forma pauperis. The district court also continued the stay of execution pending the disposition of this appeal.

II.

Williams first contends that the evidence of unadjudicated criminal conduct submitted to the jury at the punishment phase of the trial violates the eighth and fourteenth amendments. Williams also asserts that the equal protection clause of the fourteenth amendment is violated because Texas allows for the introduction of unadjudicated offenses in capital sentencing trials but not in noncapital cases. We discuss the merits of each contention in turn.

A.

[1] In the punishment phase of Williams' trial, evidence was introduced regarding Williams' participation in an armed robbery of a restaurant less than two weeks prior to the time he murdered Awada.[3] Williams contends that because there was no evidence that he was either charged or convicted for the offense, such evidence lacks reliability and results in an arbitrary imposition of the death penalty in violation of the eighth and fourteenth amendments. We disagree.

We have already rejected the argument advanced by Williams in *Milton v. Procunier*, 744 F.2d 1091 (5th Cir.1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985). In *Milton* the state put evidence of unadjudicated criminal conduct before the jury during the punishment phase of a capital trial. We rejected the contention of the habeas petitioner that the admission of this evidence violated his rights under the fifth, sixth, eighth, and fourteenth amendments. *Id.* at 1093, 1097. We noted that under the structure of the Texas death penalty system, a jury must find that a murder was committed under one of the circumstances defined in Tex.Penal Code Ann. § 19.03(a) before it considers whether to impose the death penalty. *Id.* at 1097 n. 5 (quoting *Autry v. Estelle*, 706 F.2d 1394, 1406 n. 5 (5th Cir.1983), *cert. denied*, 465 U.S. 1085, 104 S.Ct. 1458, 79 L.Ed.2d 906 (1984)). We concluded that the structure of the Texas death penalty system and the admission of unadjudicated criminal conduct during the punishment phase "in no way undermines the constitutionally mandated procedures set forth by the Supreme Court in *Jurek [v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)], and [*Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)]." *Id.*

We emphasize that evidence of Williams' extraneous unadjudicated offense was not allowed to be introduced until the punishment phase and thus eliminates any concern that the jury used this unadjudicated offense to influence its decision in the guilt phase of the trial. The focus of the Texas capital sentencing procedure is to have all the relevant evidence before the jury when answering the special issues which determine whether the death penalty will be imposed. *Jurek*, 428 U.S. at 276, 96 S.Ct. at 2958. Acknowledging society's reservations about the use of wrongdoing not then being tried, we stated in *Milton* that these

3. Three witnesses testified during the punishment phase about Williams' participation in the robbery at the restaurant. Two of the witnesses, Leon Dobbins and Samuel Byrd, positively identified Williams as one of the four armed robbers in question. The record does not indicate that Williams was ever charged with this robbery.

concerns "are addressed by properly applied standards of relevance and sufficiency of proof." 744 F.2d at 1097.[4] As Justice Stevens said in *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983):

> [T]he Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating circumstances or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime ... What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.

463 U.S. at 967, 103 S.Ct. at 3433 (Stevens, J., joined by Powell, J., concurring in the judgment) (quoting in part *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 3440, 77 L.Ed.2d 235 (1983) (emphasis added by *Zant*)) (citations omitted).

[2] Evidence of these unadjudicated crimes is clearly relevant to the jury's task of determining whether there is a probability that Williams would continue to commit acts of violence as required by special question two. Consistent with our decision in *Milton*, we hold that the admission of unadjudicated offenses in the sentencing phase of a capital trial does not violate the eighth and fourteenth amendments.[5]

B.

Williams also alleges that because Texas allows for the introduction of unadjudicated offenses in capital sentencing trials but does not allow such evidence in noncapital cases, the Texas capital sentencing procedure violates the equal protection clause of the fourteenth amendment. We reject this argument.

[3] Our first task in an equal protection challenge is to identify the level of scrutiny that must be used. Williams' complaint is that capital defendants are treated differently from noncapital defendants. We agree with Williams that the rational basis test should be used to test Texas' sentencing procedure; we have already held that capital defendants are not a suspect class for equal protection purposes. *Gray v. Lucas*, 677 F.2d 1086, 1104 (5th Cir.1982), *cert. denied*, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983).

[4, 5] Rational basis scrutiny requires only that the legislative classification rationally promote a legitimate governmental objective. *Arceneaux v. Treen*, 671 F.2d 128, 131 (5th Cir.1982). This constitutional standard is "offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective." *Id.* at 132 (quoting *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961)). We believe that Texas' capital sentencing procedure passes constitutional muster under the rational basis standard. The purpose of allowing evidence of nonadjudicated offenses to be considered in the sentencing phase is to assist the jury in determining whether the defendant is likely to be a continuing threat to society. This evidence helps focus the jury on the particular circumstances of the individual offense and the individual offender. *Jurek*, 428 U.S. at 273, 96 S.Ct. at 2957. Given the finality of a death sentence, Texas has a strong interest in ensuring that all relevant evidence concerning the capital defendant is placed before the jury so that it can consider the evidence when answering the special issues. In fur-

4. We note that Tex.Code Crim.Pro.Ann. art. 37.071(a) provides that the jury may not use evidence in the punishment phase which violates either the federal or state constitution. Furthermore, Texas decisions have uniformly approved the admission of unadjudicated offenses. *See, e.g., Rumbaugh v. State*, 629 S.W.2d 747, 754 (Tex.Crim.App.1982) (en banc); *Milton v. State*, 599 S.W.2d 824, 827 (Tex.Crim.App.) (en banc), *cert. denied*, 451 U.S. 1031, 101 S.Ct. 3022, 69 L.Ed.2d 400 (1980).

5. Williams also asserts that he is entitled to a stricter interpretation of due process because he has been sentenced to death. We have already rejected this argument. *Bass v. Estelle*, 696 F.2d 1154, 1157 n. 2, *modified on petition for reh'g*, 705 F.2d 121 (5th Cir.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 200, 78 L.Ed.2d 175 (1983).

thering this interest, the state could rationally decide that different procedures should be used for capital defendants than for noncapital defendants. Consequently, we reject Williams' assertion that Texas' capital sentencing procedures violates the equal protection clause of the fourteenth amendment.

III.

Finding all of Williams' claims to be without merit, the judgment of the district court dismissing Williams' habeas petition is AFFIRMED and the stay of execution issued by the district court is VACATED.

AFFIRMED; STAY OF EXECUTION VACATED.

Rita KOONCE, et al.,
Plaintiffs-Appellees,

v.

QUAKER SAFETY PRODUCTS & MANUFACTURING COMPANY, and Delaware Valley Safeguards Company, Inc., Defendants-Appellants.

No. 84-2749.

United States Court of Appeals,
Fifth Circuit.

April 10, 1987.

In products liability action, appeal was taken from judgment of the United States District Court for the Eastern District of Texas, at Texarkana, Joe J. Fisher, J. Following affirmance of judgment against defendants and reversal of dismissal of contribution and indemnity actions against third-party defendants, 798 F.2d 700, defendants petitioned for rehearing. The Court of Appeals, Garwood, Circuit Judge, held that reversal of plaintiffs' judgment against defendants was not required on account of the error in dismissing the contribution or indemnity actions against the third-party defendants.

Petition overruled.

1. **Federal Courts** ⇐944

General retrial of products liability action and third party contribution or indemnity action was not required upon reversal of dismissal of the third party action; products liability suit was error free, defendants were permitted to put on evidence and have instructions on third party defendants' fault, the erroneous dismissal was based on then binding precedent and reversal of judgment for plaintiff would be unfair to them; declining to extend *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160 (Tex.).

2. **Federal Courts** ⇐433

Even in diversity cases, scope of appropriate retrial is a matter of federal procedure not controlled by state practice.

Michael L. Dunn, Smead, Anderson & Dunn, Longview, Tex., for defendants-appellants.

Mike A. Hatchell, Tyler, Tex., for E.I. Du Pont & Angelica Uniform Group.

C. Wayne Dowd, Texarkana, Ark., for Nat. Engineer Co.

Charles Attaway, Texarkana, Tex., for Koonce, et al.

Eric Eisenbraun, Harold F. Degenhardt, Gibson, Dunn & Crutcher, Dallas, Tex., for McGraw Edison Co.

Robert H. Frost, Dallas, Tex., for Automatic Sprinkler Co.

Appeal from the United States District Court for the Eastern District of Texas.

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

ON PETITION FOR REHEARING

(Opinion August 15, 1986, 5 Cir., 1986, 798 F.2d 700)

GARWOOD, Circuit Judge:

[1] Defendants-appellants Quaker Safety and Delaware Valley complain in their